No. 89-1520

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COOK INLET TRIBAL COUNCIL, C.A.A. and C.M.F.,
A Tribal Mother and Her Minor Child,
Petitioners,

v.

CATHOLIC SOCIAL SERVICES, INC., C.G. and S.G.,
Respondents.

On Petition for a Writ of Certiorari to the Alaska Supreme Court

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BRIEF AMICI CURIAE ON BEHALF OF FIVE AMERICAN INDIAN TRIBES IN SUPPORT OF PETITIONERS

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The amici described below submit this brief because of the vital importance of this case to every tribe in the United States. We urge the Supreme Court to grant certiorari to the Supreme Court of the State of Alaska to review and correct a state court decision that erroneously interprets the plain language of the statute and this Court's precedent.

INTEREST OF AMICI CURIAE

Amicus METLAKATLA INDIAN COMMUNITY is a federally recognized Indian tribe inhabiting the Annette Islands Reservation in Alaska. This Reservation, which is the only federal Indian reservation in Alaska, was established by Congress for the Metlakatla Indians "and

such other Alaska Natives as may join them." Act of March 3, 1891, 26 Stat. 1101, 25 U.S.C. § 495. The 1987 population of the Reservation was 1,481, of whom 1,303 were members of the Community, and 47 were nonmember Indians or Alaska Natives. The Metlakatla Indian Community governs itself under a Constitution and Bylaws approved by the Secretary of the Interior pursuant to section 16 of the Indian Reorganization Act, 25 U.S.C. § 476.

Amicus SEMINOLE TRIBE OF FLORIDA is a federally recognized tribe which occupies federal trust lands in the Big Cypress, Hollywood and Brighton Reservations and in the Imokolee and Tampa Indian Communities in Florida. The total population of the Florida Seminole Tribe is estimated at 1,800. The Seminole Tribe governs itself under a Constitution and Bylaws approved by the Secretary of the Interior pursuant to section 16 of the Indian Reorganization Act, 25 U.S.C. § 476.

Amicus THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, North Dakota, is a federally recognized tribe consisting of the Mandan, Hidatsa and Arikara Tribes of Indians. The Tribe inhabits the Fort Berthold Reservation, containing about 1,000,000 acres. The Tribe governs itself under a Constitution and Bylaws approved by the Secretary of the Interior pursuant to section 16 of the Indian Reorganization Act, 25 U.S.C. § 476. The Indian population of the Fort Berthold Reservation is approximately 3,000.

Amicus MICCOSUKEE TRIBE OF INDIANS OF FLORIDA is a federally recognized Indian tribe, which occupies lands reserved by the Secretary of the Interior within the Everglades National Park, and a federal reservation north of the Park. The total enrolled membership of the Miccosukee Tribe is estimated at 300. The Miccosukee Tribe governs itself under a Constitution and Bylaws approved by the Secretary of the Interior pursuant to

section 16 of the Indian Reorganization Act, 25 U.S.C. § 476.

Amicus POARCH BAND OF CREEK INDIANS is a federally recognized tribe inhabiting the Poarch Band Federal Reservation in Atmore, Alabama. The total membership of the Poarch Band is 1,848. The Tribe first gained federal recognition in 1984. It governs itself under a Constitution and Bylaws approved by the Secretary of the Interior pursuant to section 16 of the Indian Reorganization Act, 25 U.S.C. § 476.

As federally recognized Indian tribes, amici file this brief in support of Petitioners because of a sincere and legitimate interest in the outcome of this case.* It involves the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (ICWA), an Act vitally important to the survival of all tribes, all of whose members are eligible for the protection of the Act. Congress's fundamental purpose in the Act is, whenever reasonable and possible to keep Indian children within the Indian community and to maintain Indian culture.

The issues presented are whether the ICWA requires states to notify an Indian tribe of a proceeding in state court that involves the voluntary adoption of a tribal member into a non-Indian family, and whether the tribe has a right to intervene in the proceeding. The Alaska Supreme Court, wrongfully and arbitrarily, has decided that no right of intervention exists and, therefore, no notice is required.

This interpretation would deny tribes fundamental rights guaranteed by the ICWA. The cornerstone of these rights is the right of tribes to intervene in "any" proceeding involving placements of Indian children by

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* All parties have consented in writing to the filing of this brief. Copies of these consent letters are being filed with the Clerk of this Court.

state action, including voluntary adoptions. 25 U.S.C. § 1911(c).

By removing voluntary placements from the Act's coverage, the Alaska Supreme Court destroys much of the foundation of the legislation. Just two examples illustrate the point. The court's ruling would allow parties to private adoptions to ignore, or remain ignorant of, the right of a tribe to establish orders of preference for placement of members in adoptive homes. The court's decision also would allow private adoption agencies, state courts and even Indian parents unilaterally to disfranchise children from their inherent right to their tribal heritage.

This brief is offered to assist the Court to recognize the importance of the foregoing issues. They are especially important to the Metlakatla Indian Community, an Alaska tribe bound by the Alaska decision. The issues also are of concern to the other tribes participating in this submission and to all tribes in the United States.

Because the Act has had so little Supreme Court review, state court decisions that ordinarily have little value as precedents in other states take on disproportionate significance in ICWA cases, especially when courts are seeking justification for avoiding the ICWA. One California court already has relied on this lower court's ruling to exclude a tribe from a voluntary adoption proceeding. *In re Baby Girl Argleben*, Case No. AD53227 (Cal.Sup.Ct., Orange Co., Feb. 21, 1990) (record decision). If the Alaska decision is allowed to stand, it will continue to provide unlawful support to the states' seemingly endless efforts to evade the congressional objectives so clearly stated in the Act and its legislative history.

STATEMENT OF THE CASE

The amici curiae adopt the full statement of the case presented by Petitioners. A brief summary of the facts

and proceedings is included to allow consideration of the points presented.

This case involves in Alaska Native woman, C.A.A., a member of the Cook Inlet Tribal Council (CITC) and her child, C.M.F., who is eligible for membership. For purposes of the Indian Child Welfare Act, CITC is an Indian tribe and it and its members are eligible for the protection of the Act. 25 U.S.C. § 1903(8).

The events leading up to this case were initiated by C.A.A. in 1985 when she sought assistance for her alcohol problem from Catholic Social Services (Catholic Services) in Anchorage, Alaska. Catholic Services is a private social service and adoption agency regularly involved in arranging adoptive placements for Alaska Native children in non-Native homes.

In 1986, at the urging of Catholic Services, C.A.A. "voluntarily" relinquished parental rights to C.M.F. After a relinquishment proceeding in the Alaska Probate Court, on July 15, 1986, the Alaska Superior Court entered an order terminating the parent/child relationship. No notice of any of the legal proceedings was given to the CITC. C.M.F. was placed with the G's (Respondents C.G. and S.G.), a non-Native family.

After relinquishment, C.A.A. sought assistance from her tribe to cope with her drinking. In the months that followed, through programs offered by CITC, she regained control of her life. She continued to suffer remorse for the loss of her child.

In March 1987, the G's filed a petition to adopt C.M.F. C.A.A. learned of the adoption proceeding, and in July of 1987, both she and her tribe filed petitions to set aside the decree of termination. Ground for both petitions was the lack of notice to CITC required by the ICWA.

A probate master recommended denial of the petitions based on the conclusion that the ICWA does not explicitly state that notice of voluntary proceedings must be provided to a tribe. The Alaska Superior Court refused to follow that recommendation, recognizing the right of tribes to intervene and the necessity of notice to give the right practical effect. On appeal, the Alaska Supreme Court reversed, and issued the ruling in dispute here.

SUMMARY OF ARGUMENT

This Court's Rule 10.1(c) establishes the bases for granting review in this case. First, the lower court's decision is in obvious and material conflict with this Court's recent decision in *Mississippi Band of Choctaw Indians v. Holyfield*, —— U.S. ——, 109 S.Ct. 1597 (1989) ("*Mississippi Choctaw*"). This Court's painstaking review of the history, intent and purpose of the Act in the *Mississippi Choctaw* case, and its emphatic ruling consistent therewith, should have been sufficient to put all state courts on notice of the correct standards to apply when reviewing cases under the Act. Apparently, it was not.

Second, the Indian Child Welfare Act is an important —nay, vital—federal law protecting the cultural welfare of Indian tribes and their families. The Alaska Supreme Court's narrow interpretation of the Act underscores the compelling need for this Court again to provide consistent standards for reviewing the Act and fulfilling its purposes.

ARGUMENT

I. THE LOWER COURT OPINION VIOLATES THE PREVIOUS RULING OF THIS COURT.

The issues before the Court are matters virtually decided in the *Mississippi Choctaw* case. Justice Brennan's opinion noted the essential purpose of the ICWA is to maintain the Indian family-tribal relationship. ". . . [T]he conclusion seems justified that as one state court has put it, '[t]he Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected.' [*In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 204, 635 P.2d 187, 189 (1981).]" 109 S.Ct. at 1609, n.24.

In underscoring this Court's recognition of Congress' commitment to that central purpose, Justice Brennan addressed the issue whether the "voluntary" nature of a proceeding could alter tribal rights under the Act. He held that it could not. 109 S.Ct. at 1608. He specifically listed all of the fundamental guarantees provided to tribes by the ICWA, including the right to intervene and to receive notice. 109 S.Ct. at 1609. He commented that these provisions "must . . . be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves." *Id.* He then stated as follows:

> In addition, it is clear that Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture. Congress determined to subject such placements to the ICWA's jurisdictional and other provisions, *even in cases where the parents consented to an adoption*, because of concerns going beyond the wishes of individual parents.

109 S.Ct. at 1609 (emphasis added) (footnote omitted). Nothing more need be said.

II. THE RULING BELOW INCORRECTLY INTERPRETS THE INDIAN CHILD WELFARE ACT.

Putting aside the *Mississippi Choctaw* case for a moment, however, an important point to remember is that the Alaska opinion is just plain wrong. It is wrong even if this Court had not so clearly and emphatically made it so.

The ICWA is important federal legislation designed to stop the wholesale and unwarranted removal of Indian children to non-Indian homes. The epidemic of such removals has been characterized as ". . . the most tragic aspect of Indian life today." Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess. 3 (1974) (Statement of William Byler) ("1974 Hearings").

The Alaska Supreme Court opinion is wrong because it states that Congress did not grant intervention rights to tribes in involuntary proceedings. The Act, however, specifies that tribes shall have the right to intervene in "*any* State court proceeding for the . . . termination of parental rights to . . . an Indian child . . . ." 25 U.S.C. § 1911(c) (emphasis added).

The opinion is wrong because it ignores the fact that the statute requires that "[i]n *any* adoptive placement of an Indian child . . ." the court must follow the placement preferences of the Act unless the child's tribe ". . . shall establish a different order of preference . . . ." 25 U.S.C. §§ 1915(a) and (c) (emphasis added). Furthermore, the Act directs state courts, in meeting the foregoing preference requirements, to apply "[t]he prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family member maintains social and cultural ties." 25 U.S.C. § 1915(d).

What should have been obvious to the Alaska court is the complete inability of a court to comply fully with any

of the foregoing provisions without involvement of, and therefore notice to, the tribe. The language is sufficiently straightforward to invoke this Court's "plain meaning" rule. *See, e.g., Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 (1978) (invoking the ordinary meaning of the plain language of the statute).

Even if the language could be deemed to paint a clouded picture, the lower court should have applied this Court's ". . . 'eminently sound and vital canon,' [citation omitted] that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918)." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). Correctly applying the foregoing or the "plain meaning" rule would result in the opposite of the conclusion reached by the Alaska Supreme Court.

The opinion is wrong because it is so patently out of line with the express findings of Congress, which are emblazoned across the face of the ICWA. There Congress found that ". . . an alarmingly high percentage of Indian families are broken up by the removal . . . of . . . children [who] are placed in non-Indian foster and adoptive homes . . . ." 25 U.S.C. § 1901(4). Congress further found that, in exercising jurisdiction, ". . . States . . . often failed to recognize the essential tribal relations of Indian people . . . ." 25 U.S.C. § 1901(5).

The foregoing findings provide clear guidance, in bold letters, as to how Congress wanted the ICWA construed —namely, where possible, keep Indian children in the tribal community. They certainly do not remotely encourage the result expressed by the court in Alaska.

The opinion is wrong because it ignores the dignity that must be accorded the sovereignty of Indian tribes. *See, e.g., Fisher v. District Court*, 424 U.S. 382 (1976) (*per curiam*) (as sovereign, tribe has exclusive jurisdic-

tion to determine child custody placements for members residing on reservations); *United States v. Wheeler*, 435 U.S. 313 (1978) (tribal sovereignty precludes finding of double jeopardy in separate tribal and federal criminal prosecutions).

Without citing any authority, the Alaska court created a balance between ". . . the sometimes conflicting interests of Indian parents, Indian children, and their tribes" (Pet. App. at 2a-3a) and, apparently, gave greater weight to what it (the court) considered the interests of the child. Including the tribe in a decision as profound as where an Indian child is to be raised, however, is not akin to asking a social club to join in. As sovereign governments, tribes have as much right to participate in decisions concerning the welfare of their citizens as do the states, particularly where Congress has recognized this interest and required courts to recognize it.

Furthermore, it is patently unfair to conclude that involving a tribe will always result in conflicting interests. No court has any basis to conclude that the welfare of an Indian child is better protected automatically by excluding the tribe from the proceeding. Sovereign tribes can be expected to weigh the appropriate considerations relevant to the best interests of all parties concerned in child custody cases. Indeed, nothing in the record indicates that the tribe would have objected to the termination of parental rights in this case at the time the decree was entered by the state court. The tribes' objection to the Alaska ruling is the failure of the court to give the notice required by law, not necessarily the ultimate result of the proceeding.

To the extent a conflict among a tribe, children and/or parents does exist, the ICWA gives some discretion to the state court to resolve it. In applying the placement preferences, the Act states that ". . . [w]here appropriate, the preference of the Indian child or parent shall be considered . . . ." 25 U.S.C. § 1915(c).

The foregoing does not even hint that Congress saw the conflict so apparent to the lower court. The Alaska court is merely substituting its subjective judgment of social policy for the legal policy judgment plainly expressed in the Act. By doing so, it insults the Congress, the ICWA and all Indian peoples.

The opinion is wrong because it allows the unilateral disfranchisement of Indian children from their tribal affiliation by inappropriate persons. Retention of membership in an Indian tribe is a political privilege of the individual Indian. *United States ex rel. Standing Bear v. Crook*, 25 F.Cas. 695, 699 (C.C.D. Neb. 1879) (No. 14,891). The ICWA is designed to reserve the right of Indian children to choose whether or not to exercise this privilege when they are old enough to do so intelligently. Under the Alaska court's decision, the opportunity to exercise that privilege can forever be precluded by state courts and agencies when the Indian child is a mere infant. Ironically, under the Alaska ruling, even parents who want forever to give up responsibility for providing care and comfort can waive this fundamental right on behalf of a helpless child.

Finally, the opinion is wrong as a reflection of human kindness. The legislative history of the Act records the repeated poignant story of adolescent Indian youth, adopted as infants by non-Indians, drifting in limbo between two worlds, denied by circumstances a place in either. Experts and lay persons alike chronicled this unfortunate tale, authored for the most part by state courts. *See, e.g.*, 1974 Hearings at 46; S. Rep. No. 95-597 at 43 (1977). Congress got the message, but the moral of the story did not reach the Alaska Supreme Court.

CONCLUSION

In *Mississippi Choctaw*, this Court gave unequivocal guidance to state courts on how the ICWA should be interpreted. The Alaska Supreme Court ignored it. Even without guidance, however, the Congress expressed its strong abhorrence of Indian child adoptions in the manner sanctioned by the Alaska court. The Metlakatla Indian Community, the Seminole Tribe of Florida, the Three Affiliated Tribes of the Fort Berthold Reservation, the Miccosukee Tribe of Indians of Florida and the Poarch Band of Creek Indians urge this Court to grant the Petition for a Writ of Certiorari and take the opportunity to foreclose further violations of the ICWA.

Respectfully submitted,

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